Appendix A — United States District Court, for the Northern District of Texas, Dallas Division, Memorandum and Order

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DAVID D. DALY, M. D., *Plaintiff,*	)	
vs.	)	CIVIL ACTION
CHARLES C. SPRAGUE, M.D., ET AL, *Defendants.*	)	NO. CA-3-79-1108-D

ORDER

Came on for consideration defendants' Amended Motion to Dismiss or Amended Motion for Summary Judgment. The defendants originally filed their Motion to Dismiss or Motion for Summary Judgment on August 29, 1980. The court reserved its ruling on the motion pending further discovery by an order dated September 29, 1980. The defendants reurged their motion on February 3, 1981. The plaintiff then responded to the motion and a hearing on the motion was held on February 9, 1981. The issues presented by the motion are now ripe for a decision.

The plaintiff in his original complaint sought damages and injunctive relief under 42 U.S.C. §§1983, 1985 and 1986 for alleged violations of his constitutional rights. The undisputed facts in this case show the following. Plaintiff was employed as a professor of medicine at Southwestern Medical School, a branch of the University of Texas system, where he was an instructor and had clinical privileges. On June 26, 1979, he was informed by letter that his clinical privileges had been suspended. On July 17, 1979, his clinical

privileges were fully restored at his request. It also is undisputed that plaintiff did not suffer any loss of income or status as a result of his suspension,[1] nor were his teaching privileges or his research privileges effected. Further, it is without dispute that plaintiff left town on June 22, 1979, and on June 29, 1979, while out of town and prior to receiving the letter suspending his privileges, he sought a leave of absence until July 11, 1979. Additionally, defendants did not communicate the suspension of plaintiff's clinical privileges to anyone but plaintiff, although plaintiff did tell other people of his suspension.

Plaintiff claims that the suspension deprived him of a property interest and subjected him to a loss of liberty all without due process. He further claims the suspension deprived him of his right to pursue his profession effectively, without malicious defamation of his reputation or character. He alleges specifically that he was not told of the causes for the removal of his clinical privileges, nor was he given an opportunity to contest the allegations against him. He goes on to allege that by virtue of the defendants' acts his reputation has been tarnished, and that he was forced to abandon his patients. And, finally, plaintiff alleges that defendants conspired to spread untruths about him.

The defendants' motion sets out several grounds for dismissal of this action. First, defendants Howard Richards, Dan C. Williams, Jon Newton, James L. Powell, Thomas H. Law, Walter G. Sterling, Jess Hay, Jane W. Blumberg, and Sterling H. Fly, Jr., members of the Board of Regents of the University of Texas system, claim that plaintiff has made no factual allegations which would subject them to

[1]The plaintiff contends in his responses to this motion that he did suffer a loss of income and privileges and continues to suffer the same by virtue of the defendants' wrongful acts. Although plaintiff sought to amend his complaint to include allegations that he did not receive all compensation and other privileges due him, these allegations came very late in this action and were essentionally based on actions unrelated to the gravaman of the complaint. For these reasons the Court denied leave to amend.

any liability. The Court is in agreement, and, therefore, since there are no allegations that these defendants either took part in the decisions which are alleged to have violated plaintiff's rights, or that they in any way knew of the decisions, the motion to dismiss is granted as to these defendants.

The remaining defendants argue that they should be dismissed because (1) the suit against them is barred by the Eleventh Amendment of the United States Constitution, (2) plaintiff had no property interest which they deprived him of, and (3) plaintiff had no liberty interest which they harmed. None of the allegations of plaintiff's complaint are factually supported so as to state a claim for relief under §§1983, 1985 or 1986 and, thus, are not able to survive the defendants' motion.[2]

One loss plaintiff alleged resulted from this suspension was a loss of his right and ability to treat patients. Although there is a factual dispute as to whether the suspension meant that the plaintiff could not treat any patients, old and new, or only that he would not be assigned any new patients, plaintiff has alleged only one instance where there could have been any possible interference with the doctor-client relationship. This involved a consultation by plaintiff with other doctors regarding the other doctor's patient, whom plaintiff had not yet examined. Plaintiff, however, has not pointed to any specific facts which support these allegations. In addition, since he was voluntarily absent during a substantial part of the suspension period any inter-

[2]The Court has treated this motion as one for summary judgment since in deciding the motion the Court considered the affidavits and other discovery material on file. Consequently, the plaintiff may not rest solely on his pleadings but must present specific facts to support his allegations. The plaintiff has had ample opportunity to conduct discovery and present any relevant facts to the Court. In addition, since affidavits were filed with the Court in connection with the original motion, the plaintiff has been aware for a substantial time that he would be forced to counter these affidavits with specific factual showings. Therefore, the plaintiff is not prejudiced by the Court's treating this motion as one for summary judgment.

ference with his relationship with his patients was as much a result of his own actions as any actions of the defendants. Thus, he had no liberty or property interest that was harmed by defendants.

The plaintiff also contends that the communication of his suspension to others damaged his reputation and consequently resulted in a constitutional loss. However the plaintiff himself acknowledged that defendants did not communicate their suspension of plaintiff's clinical privileges to anyone but plaintiff; under these circumstances defendants can hardly be charged with defaming plaintiff's reputation or character, or spreading untruths about him. In addition, since plaintiff retains his position, even if defendants' actions did defame him plaintiff's claim that his reputation was damaged does not give rise to a loss of a protected interest. *See Paul v. Davis*, 424 U.S. 693 (1976); *Moore v. Otero*, 557 F.2d 435 (5th Cir. 1977).

Plaintiff does argue that the suspension of his clinical privileges amounted to a "loss of employment" and thus presented "the type of loss of tangible interest connected with stigmatizing state action that, under *Paul*, could give rise to a property interest." *Moore*, supra, at 438, n. 11. Although a suspension of clinical privileges may under some circumstances be so onerous as to constitute a "loss of employment," the facts of the instant case do not rise to such a level. Plaintiff was officially suspended for only 22 days, but in truth since plaintiff was on voluntarily leave until July 11, the effective period of suspension was actually less than a week. At the end of this time his privileges were fully restored. This suspension, whether it be 22 days or 7 days, hardly rises to the level of a "loss of employment." Therefore, plaintiff has failed to assert a property interest that was injured by his suspension.

As to plaintiff's other allegations, he has not shown that he was entitled to a name-clearing hearing under *Codd v. Velger*, 429 U.S. 624 (1977), that state law gave him a right to any sort of procedural process before suspension, or that he had

a constitutional right to any procedural due process prior to his suspension. *C.f., McDowell v. State of Texas*, 465 F.2d 1342 (5th Cir. 1971), *cert. denied*, 410 U.S. 943 (1973) (no substantive or procedural due process violation where a state employee was terminated without a hearing). Even if defendants actions constituted some kind of actionable tort under state law, these actions would not necessarily give rise to a constitutional claim. *See Paul, supra; Cook v. Houston Post*, 616 F.2d 791 (5th Cir. 1980). Finally, some claims are so insubstantial that they are insufficient to establish a cause of action based on a constitutional violation. *See Raymon v. Alvord Independent School District*, 639 F.2d 257 (5th Cir. 1981).[3]

[3]In addition, the Court notes without deciding that plaintiff's claim against defendants appears to be against them only in their official capacity, and would, therefore, be barred under the Eleventh Amendment at least as to the damage portion of his claim. *See* Edelman v. Jordan, 415 U.S. 651 (1974).

Therefore, it is ORDERED that the defendants' Motion for Summary Judgment should be granted in all respects.

Dated this 30th day of April, 1981.

R. HILL
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DAVID D. DALY, M.D., *Plaintiff,*	)	
vs.	)	CIVIL ACTION
CHARLES C. SPRAGUE, M.D., ET AL, *Defendants.*	)	NO. CA-3-79-1108-D

JUDGMENT

Came on for consideration the defendants' Amended Motion to Dismiss or Amend Motion for Summary Judgment, before the Court, Honorable Robert M. Hill, District Judge, presiding, and the Court having granted the motion,

It is ORDERED and ADJUDGED that the plaintiff take nothing, that the action be dismissed on the merits and that the defendants recover of the plaintiff David D. Daly, M.D., their costs of action.

R. HILL
United States District Judge

Appendix B — United States Court of Appeals for the Fifth Circuit, Opinion.

[Caption Deleted]

Appeal from the United States District for the Northern District of Texas, Dallas Division.

No. 81-1237

Decided May 14, 1982

AFFIRMED IN PART, REVERSED IN PART and REMANDED WITH INSTRUCTIONS

Before THORNBERRY, REAVLEY and RANDALL, Circuit Judges.

RANDALL, Circuit Judge:

Plaintiff, David Daly, M.D., appeals from summary judgment granted in favor of Charles C. Sprague, M.D., Frederick Bonte, M.D., Roger N. Rosenberg, M.D., the Board of Regents of the University of Texas and Regents Howard Richards, Dan Williams, Jon Newton, James Powell, Thomas Law, Walter Sterling, Jess Hay, Jane Blumberg and Sterling Fly (collectively the "Defendants"). Daly had brought suit pursuant to 42 U.S.C. §§1983, 1985 and 1986 alleging that removal of his clinical privileges as a faculty member of Southwestern Medical School violated his first amendment rights to freedom of speech and association and his fourteenth amendment rights to procedural due process and equal protection under the law. Jurisdiction was predicated on 28 U.S.C. §§1331 and 1343. The district court entered summary judgment for the Defendants, finding that Daly had failed to state any claim upon which relief could be granted. We hold that the granting of summary judgment as to Daly's claim of infringement of his first amendment rights as improper because the district court wholly failed to consider this claim. As a matter of law we remand the case for consideration of this issue.

I. FACTUAL AND PROCEDURAL BACKGROUND

David Daly was at the time of the incident giving rise to this action a tenured professor in the Department of Neurology (the "Department"), at the Southwestern School of Medicine (the "Medical School"), a component of the University of Texas Health Sciences Center (the "Center"), which is a branch of the University of Texas System. His duties included giving lectures to medical students, interns, and residents at the Medical School and consulting with and treating neurological patients at the Center.

Defendant Roger M. Rosenberg, Chairman of the Department, was Daly's immediate supervisor at the Medical School. Defendant Charles C. Sprague was President of the Medical School; defendant Frederick J. Bonte was Dean of the Medical School; original defendant Michael Blaw was Vice-Chairman of the Department.[1]

In June, 1979 Daly's wife became ill. On June 18, 1979, Daly informed Sprague of his wife's illness and the need for Daly to care for her. On June 22 he informed Sprague's secretary that it was necessary that he absent himself from his hospital duties to be with his wife who was to be hospitalized in another city.

During that same period of time Bonte attempted to schedule a meeting with Daly to discuss his duties as a faculty member. Daly, because of his wife's illness, cancelled several appointments. Daly and Bonte finally met on June 29. Bonte informed Daly that Daly's clinical privileges as a faculty member had been removed by Rosenberg on June 26, 1979, a decision in which Sprague and Bonte concurred. Bonte informed Daly that this decision had been communicated to Daly in a June 26 letter[2] from Rosenberg

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[1]Blaw was dismissed as a defendant by the district court with Daly's concurrence at the hearing on motion for summary judgment.

[2]The letter states in pertinent part:

> After discussing in some detail with Dr. Bonte and Dr. Sprague, the matter of the quality of your professional activities

(which Daly had not yet received). Bonte and Daly did not discuss the exact implications of the removal of the clinical privileges,[3] Bonte referred Daly to Rosenberg. Daly then immediately went to Rosenberg, requested and received a leave of absence (from June 29, 1979 to July 10, 1979). Daly, however, failed to discuss reasons for removal of his clinical privileges with Rosenberg.

Daly returned from leave on July 10. On that date and again on July 16, he wrote Rosenberg concerning the removal of his clinical privileges, stating in the July 10th letter

> Your letter of 26 June causes me great anguish. Removal of clinical privileges without specific charges, investigation and hearing has impugned my good name and may seriously impair my ability to care for my patients. Please provide me with copies of the University of Texas regulations relating to clinical privileges,

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and personal conduct in the recent past, and in view of your recent phone call to Dr. Sprague indicating the uncertainty of your continued full-time presence, it is my responsibility to inform you that as of today your clinical privileges as a faculty member in this department have been removed. Dr. Bonte and I have discussed the numerous areas of concern that I have had about your overall performance here and he has attempted on several occasions to meet with you to discuss these issues. You have not kept any of these appointments with Dr. Bonte and thus you leave us no course but to take this action.

[3]Whether the removal of the clinical privileges affected Daly's ability to see current patients or only new patients at the Center is unclear from the deposition testimony of the parties. Daly alleged that his clinical privileges to see new patients were removed and that he was told not to consult with current patients. Daly does not allege he was foreclosed from private practice. The Defendants maintain he was only removed from the list of faculty members who saw new patients at the Center and that his right to see current patients or engage in private practice was not impaired. They do not remember telling him not to communicate with current patients. Any distinction as to which patients he could or could not see is not, however, a determining factor in our decision as we hold Daly had not established the existence of a protected interest in his clinical privileges to see current or new patients. See part IV, *infra*.

> removal, etc. I believe that I have been deprived of due process.

and in the July 16th letter:

> At no time recently have you discussed with me or expressed any concern to me about my professional activities. Your only written communication to me has been your letter dated June 26, removing my clinical privileges; that instrument contained neither explanation nor justification for that extreme act. In the meeting of June 29, Dean Bonte indicated that he was aware of the contents of your letter but declined to discuss them and indicated that he saw no reason for future meetings between him and me. When I returned from leave on July 10 and read your letter, your unavailability left no recourse but to meet with President Sprague for interpretation of this action. President Sprague indicated that I was a University employee and thus prohibited from communicating with any patients.

At some time after July 10th, Daly spoke to Sprague concerning the loss of privileges and, according to Daly, Sprague told him not to communicate with any of his patients. Daly has alleged that during the week of July 11-17, 1979, as a result of Sprague's ultimatum, he was forced to cancel a consultation with an out-of-town physician concerning a seriously ill patient in Dallas and that he could not communicate with at least two other patients.

On July 17, 1979, Rosenberg replied to Daly's letters:

> I returned yesterday from a week-long trip out of town and read for the first time your letters dated July 10 and July 16, 1979. I can appreciate your concern in having your clinical privileges as a faculty member in this department being removed. This was a proper step which had to be taken by Dr. Bonte and myself because of your unavailability and inability to function

for an uncertain period. You indicate in your two letters that you are now prepared to return to full-time clinical and academic activities and therefore with the concurrence of President Sprague, I return to you your full clinical and professional privileges as a faculty member in this medical school.

Daly's clinical privileges were restored on July 17, 1979.

On August 31, 1979, Daly filed suit in the District Court for the Northern District of Texas alleging that the Defendants had, in the removal of his clinical privileges, deprived him of liberty and propery without due process in violation of the fourteenth amendment and had, through Sprague's order forbidding communication with patients, violated Daly's first amendment rights to freedom of speech and association.

Daly's inclusion in his suit of the members of the University of Texas Board of Regents (the "Regents") was based on the allegation that they failed to "direct govern and operate the University of Texas Health Science Center at Dallas in a manner conforming to law...."

The suit languished for nearly a year. Efforts at settlement failed. On August 27, 1980, the Defendants filed a Motion To Dismiss Or For Summary Judgment (hereinafter "Motion for Summary Judgment"). Daly's counsel then withdrew; and Daly hired new counsel who requested additional time for discovery. The motion for additional time was granted. Daly on December 5, 1980, requested discovery relating to events occurring after the suit was filed. That motion was denied by a magistrate on December 8, 1980, and affirmed by the district court on January 5, 1981. Discovery was once again extended and finally completed on January 20, 1981. Trial was set for February 9, 1981. On January 20, 1981, Daly attempted to amend his complaint; the motion

to amend was denied.[4] Defendants then amended and reurged their Motion for Summary Judgment, claiming that Daly had failed to allege facts sufficient to show a cause of action; they specifically asserted that Daly alleged no property interest of which he had been deprived, that he had not shown deprivation of a liberty interest, that there had been no damage to reputation, that he had failed to demonstrate that he had been forced to abandon any patients, that the University of Texas Board of Regents collectively and individually were not liable in this §1983 action and that any complaint for damages was barred as to the Defendants by the eleventh amendment because Texas, rather than the individual defendants, was the real party in interest.

[1] The district court, after a hearing on February 9, 1981, granted the Motion For Summary Judgment[5] finding that

> The undisputed facts show ... on June 26, 1979, [Daly] was informed by letter that his clinical privileges had been suspended.[6] On July 17, 1979, his clinical privileges were fully restored at his request. It also is undisputed that plaintiff did not suffer any loss of income or status as a result of his suspension, nor were his teaching privileges or his research privileges effected. Further, it is without dispute that [Daly] left town on June 22,

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[4]The denial of the motion to amend stated:

> Came on for consideration the plaintiff's motion for leave to amend. Considering that this case is set for trial on February 9, 1981, and that the matter urged in the amended complaint could have been raised at an earlier time, the court is of the opinion that the motion should be denied.

[5]The district court correctly stated that because the case had progressed into discovery the Motion to Dismiss was treated as a motion for summary judgment and that affidavits and depositions were considered along with pleadings. *See Northeast Georgia Radiological Associates, P. C. v. Tidwell*, 670 F.2d 507, 510 n.7 (5th Cir. 1981).

[6]Daly argues that his privileges were removed rather than suspended. We agree. Whether the privileges were removed rather than suspended is not, however, determinative in this case. See part IV, *infra*.

> 1979, and on June 29, 1979, while out of town and prior to receiving the letter suspending his privileges, he sought a leave of absence until July 11, 1979. Additionally, defendants did not communicate the suspension of plaintiff's clinical privileges to anyone but plaintiff, although plaintiff did tell other people of his suspension.

From this factual basis the district court concluded that "[n]one of the allegations of plaintiff's complaints are factually supported so as to state a claim for relief under §§1983, 1985 or 1986 and, thus are not able to survive the defendant's motion."[7]

The district court amplified its conclusion by reciting several of Daly's allegations and then ruling on each. According to the court, one loss alleged by Daly, the loss of his right and ability to treat patients, did not result in any cognizable injury. The court stated:

> Although there is a factual dispute as to whether the suspension meant that the plaintiff could not treat any patients, old and new, or only that he would not be assigned any new patients, plaintiff has alleged only one instance where there could have been any possible interference with the doctor—client relationship.... In addition, since he was voluntarily absent during a substantial part of the suspension period any interference with his relationship with his patients was as much a result of his own actions as any actions of the defendants. Thus, he had no liberty or property interest that was harmed by the defendants.

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[7]The court also held that the Regents could not be subjected to liability.

> [S]ince there are no allegations that these defendants either took part in the decisions which are alleged to have violated plaintiff's rights, or that they in any way knew of the decisions the motion to dismiss is granted.

See part VI, *infra*.

The court found that the Defendants had not communicated Daly's suspension to anyone, and that even if they had, "since plaintiff retains his position, even if defendants' actions did defame him plaintiff's claim that his reputation was damaged does not give rise to a loss of a protected interest."

Further, the court held that "[a]lthough a suspension of clinical privileges may under some circumstances be so onerous as to constitute a 'loss of employment,' the facts of the instant case do not rise to such a level." The court found that the plaintiff's voluntary leave had reduced his suspension to less than a week, and that, even if the suspension had been for 22 days, it did not rise to the level of loss of employment. The court concluded that "plaintiff has failed to assert a property interest that was injured by his suspension."

Finally, the court found that Daly had "not shown that he was entitled to a name-clearing hearing ... [or that] state law gave him a right to any sort of procedural process before suspension, or that he had a constitutional right to any procedural due process prior to his suspension." The court also found all other unspecified claims insubstantial.

The court, in a footnote, also noted, without deciding, that plaintiff's claim against the defendants "appears to be against them only in their official capacity, and would, therefore be barred under the Eleventh Amendment at least as to the damage portion of his claim."

Daly appealed, alleging that the district court erred in: its finding that Daly's claims of harm were insubstantial, its holding that the Regents were not subject to liability, its ruling that Daly had failed to factually support his claims, its denial of his motion for discovery of events occurring after the date of filing, its denial of his Motion to Amend Complaint, its notation that Plaintiff's claim is barred by the eleventh amendment, and its conducting a hearing on

the Defendants' Amended Motion for Summary Judgment less than ten days after the filing of the Amended Motion.

We address each of Daly's arguments.

II. WHAT THIS CASE IS NOT ABOUT

[2] To a great extent Daly based his claims in his appellate brief and at oral argument on the premise that the Defendants had removed his clinical privileges because he challenged accounting practices of the Medical School, specifically those relating to one fund into which patient revenue was placed.[8] He asserts this action violates his first

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[8]Income from patients treated by faculty members went into a fund, identified as the Medical Service Research, Development and Planning fund, (MSRDP), maintained by the Department. The fund was used to supplement the legislative funding of individual salaries and to provide benefits such as travel expenses and insurance premiums. Payments for patient treatment by faculty members were deposited into the MSRDP fund rather than being received by individual faculty members; records were maintained by the Department to show the revenues credited to each physician. Dr. Rosenberg was in charge of the MSRDP fund of the Department and was primarily responsible for its accounting.

In October, 1978, Rosenberg wrote to Daly, enclosing a summary statement of MSRDP private patient income generated by Daly from 1974-78 and suggesting that Daly examine income generated from private patients in order to maintain "faculty and fringe support." The summary statement indicated the following:

MSRDP Income Generated			
1977-1978	1976-1977	1975-1976	1974-1975
$1,413	$1,720	$3,602	$4,015

In February, 1979, Robert Heins, Director of MSRDP informed Daly that, for the calendar year 1978, he had deposited $5,061.28 into the MSRDP fund.

On June 12, 1979, Daly wrote Rosenberg, stating that the summary statement MSRDP income of $1,413 was "in conflict" with the accounting provided by the Director of MSRDP showing deposits to the fund of $5,061.28. He requested that an accounting be conducted and that the alleged conflict be resolved.

amendment right to freedom of speech. See *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977). The district court did not address this claim. This is not surprising, considering that Daly did not include this claim in his Original or Amended Complaint or his Pretrial Order. The only possible reference to the allegations asserted now on appeal are several statements in Daly's brief that "the inference is strong that Daly's questioning of Rosenberg's accounting was a factor in Rosenberg's mistreatment of Daly." Most importantly, when Daly, shortly before trial, attempted to amend his complaint, he wholly failed to include *any* reference to this *Mt. Healthy* claim. Daly's almost casual statements in his briefs, absent allegations in the pleadings and specific legal argument in the briefs, do not constitute a sufficient presentation to the district court of the claim Daly now attempts to assert before this court. This claim, not raised to the district court, will not be addressed when presented for the first time at the appellate level. *West India Industries, Inc. v. Tradex, Tradex Petroleum Services*, 664 F.2d 946, 951 (5th Cir. 1981) ("The very nature of an appellate system precludes litigants from raising issues for the first time on appeal."). Because there is no indication of manifest injustice here, "we do not consider [this] afterthought first raised on appeal." *Id.*

III. DENIAL OF AMENDMENT OF COMPLAINT AND EXPANDED DISCOVERY

Daly alleges that his Motion to Amend Complaint, made on January 20, 1981, should not have been denied by the district court and that he should have been allowed discovery of events occurring after the suit was filed in August 31, 1979. We address these questions first, for if the denials of the Motion to Amend and for discovery were erroneous, the additional pleading and possible discovery may have had a bearing on the court's granting of the Motion for Summary Judgment. If nothing else, the additional information might have provided additional relevant material to be evaluated in the court's consideration of the Motion for Summary

Judgment which would affect our ability to review its decison.

[3] Our standard of review of the court's denial of the Motion to Amend Complaint is whether the district court abused its discretion in the denial. *Barrett v. Independent Order of Foresters*, 625 F.2d 73, 75 (5th Cir. 1980). In the present action, the proposed amendment restated allegations presented in the original complaint and sought to add new allegations of accounting discrepancies in the Medical School's records concerning income generated by Daly from private patients at the medical school. While Daly alleges that his amended complaint and the alleged income disrepancies would show a "continuing and concerted effort by the Defendants to destory Plaintiff's [Daly's] professional standing..." and to force his resignation, this allegation does not add substance to his previous allegations of violation of his first and fourteenth amendment rights resulting from removal of his clinical privileges. Daly's allegations of a scheme, not yet brought to fruition, to force his resignation do not give rise to a *deprivation* of a protected interest nor did he allege that his complaints about accounting irregularities led to removal of the clinical privileges.

[4] As the court said in *Barrett:*

> The decision whether to grant such a motion, however, is entrusted to the discretion of the trial court. *In re Westec*, 434 F.2d 195 (5th Cir. 1970). In the present action the proposed amendment sought to add several new parties and additional counts. Even though the motion was not filed until nearly ten months after the original complaint, there would appear to be no matters that appellant proposed to add which could not have been raised initially. Given the circumstances, this court cannot say that the trial judge abused his discretion.

Barrett v. Independent Order of Foresters, 625 F.2d at 75. We find this logic compelling in the case before us. The court

did not abuse its discretion in denying an amended complaint which asserted new allegations not germane to the original action and which was filed sixteen months after the filing of the original complaint.

[5] Daly also complains that the district court erred in failing to allow additional discovery of events occurring after the filing of the suit on August 31, 1979. Daly alleges that, since he has asked for injunctive relief against the Medical School's future removal of clinical privileges and future interference with his constitutional rights of speech, he should be able to expand discovery from the date the suit was filed to the present time.

Our standard of review is whether the district court abused its discretion in refusing to permit the discovery. *Id.* Our review of the record indicates that no such abuse occurred. Under the basic rule of discovery that a matter must be "relevant to the subject matter involved in the pending action," Fed.R.Civ.P. 26, Daly has not shown how events between August 31, 1979, and the present are relevant to the past removal of his clinical privileges or to his wholly speculative fears of future removal of these privileges. As the magistrate found:

> Plaintiff's pleadings do not contain any representation that any of his privileges or rights have been withdrawn or modified by the Defendants since July 17, 1979. Absent some act or conduct which adversely affects a "property interest" of the Plaintiff, no claim cognizable under the Civil Rights Act is stated. Thus the expectation or fear that at some future date the Defendants may take actions which impinge upon constitutionally protected "property interests" does not give rise to a cause of action. Of course the present motion is presented in the context of Discovery, and this Court is not called upon to determine the admissibility of information of records pertaining to events subsequent to August 31, 1979. However, the information sought, to wit;

> acts and conduct of the Defendants occurring after Plaintiff's suspension was terminated on July 17, 1979, and after August 31, 1979 have no bearing whatsoever on whether the Defendants' acts and conduct prior to the Plaintiff's suspension on or about June 26, 1979 were constitutionally permissible or proscribed.

The denial of Daly's requested discovery of events occurring after the filing of the suit was not an abuse of discretion.

IV. FOURTEENTH AMENDMENT VIOLATIONS

Crucial to the analysis of the propriety of the grant of summary judgment is the determination whether Dr. Daly possessed a liberty or property interest which would bring into play the due process guaranties of the fourteenth amendment. *Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975).

The district court, in its analysis* of Daly's claims seemed, in some instances to determine that, as a matter of law, Daly had no protected liberty or property interest and in other instances to rule that there were no facts presented which would support the allegations of any deprivation of a protected interest.

We agree with the conclusion of the district court that summary judgment should be granted on the fourteenth amendment claims. We hold that Daly failed to sustain the burden required of him in a motion for summary judgment to demonstrate facts to support his allegation that he had property and liberty interests in the clinical privileges associated with his professorship.

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*See text, pp. 721-722, *supra*, for a detailed review of the district court's findings.

[6] We briefly review the standard applicable to the granting of summary judgment.[10]

Fed.R.Civ.P. 56(b) states:

> *For Defending Party.* A party against whom a claim, counterclaim, or crossclaim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

This is further amplified by Fed.R.Civ.P. 56(c) which provides in pertinent part:

> *Motion and Proceedings Thereon.* The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, to-

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[10]The Defendants argue that our standard of review of a granting of a summary judgment is whether the court abused its discretion, citing for that proposition *Walters v. City of Ocean Springs*, 626 F.2d 1317 (5th Cir. 1980). Defendants misapprehend *Walters*. *Walters* involved the review of summary judgment motion where the district court refused to grant a continuance to a nonmoving party to obtain evidence to controvert the motions for summary judgment. The error claimed was in the refusal of the court under Fed.R.Civ.P. 56(*f*) to grant additional time. The standard of review was whether the district court abused its discretion. *Walters* at 1321. When, however, the question is whether the granting of the summary judgment was correct, the standard of review is whether there were absolutely no factual disputes and whether the movant was entitled to judgment as a matter of law.

> By contrast to the "abuse of discretion" standard we employ for review of the trial court's rulings on rule 56(f) motions, here we look at the record in the light most favorable to the party opposing the motion. *E.g., Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 [82 S.Ct. 486, 7 L.Ed.2d 458] (1962); *O'Boyle Tank Lines, Inc. v. Beckham*, 616 F.2d 207, 209 (5th Cir. 1980).

Walters v. City of Ocean Springs, 626 F.2d at 1322.

gether with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

Rule 56(e) further states in pertinent part:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

This procedure has been recently summarized by this court:

Summary judgment should be entered only if "there is no genuine issue as to any material fact and... the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). *See Casey Enterprises v. American Hardware Mutual Insurance Co.*, 655 F.2d 598, 601-02 (5th Cir. 1981). In reviewing a decision granting or denying summary judgment, this court applies the same legal standards as those that control the district court in determining whether summary judgment is appropriate. *Environmental Defense Fund v. Marsh*, 651 F.2d 983, 991 (5th Cir. 1981); *United States Steel Corp. v. Darby*, 516 F.2d 961 (5th Cir. 1975).

The party seeking summary judgment bears the exacting burden of demonstrating that there is no actual dispute as to any material fact in the case. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 1608, 26 L.Ed.2d 142 (1970); *Environmental Defense Fund v. Marsh*, 651 F.2d at 990-91. In assessing whether the

movant has met this burden, the courts should view the evidence introduced and all factual inferences from that evidence in the light most favorable to the party opposing the motion. *Id.* All reasonable doubts about the facts should be resolved in favor of the non-moving litigant. *Casey Enterprises v. American Hardware Mutual Insurance Co.*, 655 F.2d at 602. A court must not decide any factual issues it finds in the record, but if such are present, the court must deny the motion and proceed to trial. *Environmental Defense Fund v. Marsh*, 651 F.2d at 991; *Lighting Fixture & Electric Supply Co. v. Continental Insurance Co.*, 420 F.2d 1211, 1213 (5th Cir. 1969). Summary judgment may be inappropriate even where the parties agree on the basic facts, but disagree about the factual inferences that should be drawn from these facts. *Id.* If reasonable minds might differ on the inferences arising from undisputed facts, then the court should deny summary judgment. *Corley v. Matson Navigation Co.*, 434 F.2d 73, 75 (5th Cir. 970); *Marsden v. Patane*, 380 F.2d 489, (5th Cir. 1967).

Moreover, the party opposing a motion for summary judgment need not respond to it with any affidavits or other evidence unless and until the movant has properly carried its burden. *Adickes v. S. H. Kress & Co.*, 398 U.S. at 160, 90 S.Ct. at 1609-10; *Environmental Defense Fund v. Marsh*, 651 F.2d at 991; *Bernard v. Gulf Oil* 449 (5th Cir. 1979) (en banc), *adopted in pertinent Co.*, 596 F.2d 1249, 1255 (5th Cir.), vacated, 604 F.2d *part on rehearing en banc*, 619 F.2d 459, 463 (5th Cir. 1980), *aff'd on other grounds*, 452 U.S. 89, 101 S.Ct. 2193, 68 L.Ed.2d 693 (1981). The moving party must demonstrate that the facts underlying all the relevant legal questions raised by the pleadings or otherwise are not in dispute, or else summary judgment will be denied notwithstanding that the nonmoving party has introduced no evidence whatsoever. *Brunswick Corp. v. Vineberg*, 370 F.2d 605, 61-12 (5th Cir. 1967). See *Dalke v. Upjohn Co.*, 555 F.2d 245, 248-49 (9th Cir. 1977).

Impossible Electronic Techniques, Inc. v. Wackenhut Protective Systems, Inc., 669 F.2d 1026, 1030-1031 (5th Cir. 1982).

Under the methodology established for our analysis of this Motion for Summary Judgment, we first examine whether the Defendants have shown that there are no facts in dispute. Here, the Defendants claim, much as they would in a motion to dismiss under Fed.R.Civ.P. 12(b)(6), that there are no facts pleaded by Daly to support the threshold requirement, the existence of a property or liberty interest. The question here is not whether there are facts in dispute which preclude summary judgment, but whether Daly has alleged enough facts to allege a protected interest and avoid summary judgment.

[7] A review of the factual allegations[11] in the light most favorable to Daly demonstrate: Daly is a tenured professor at the Medical School; Daily has clinical privileges as a faculty member; his clinical privileges were removed on June 26, 1979; he was on voluntary leave of absence from June 29 to July 11, 1979; his clinical privileges were restored on July 17, 1979; the loss of clinical privileges is a serious matter to a doctor, the reason for which would be questioned in an employment interview; Daly has not attempted to apply for other employment since the removal of his clinical privileges; no official of the medical school communicated the removal of the clinical privileges to any person except Daly; the Rules and Regulations of the Board of Regents of the University of Texas System for the Government of the Texas System for the Government of the University of Texas System PART ONE) (the "Regulations") describe

[11] As previously noted, the district court's decisions to deny the Motion to Amend Complaint and to deny discovery after the suit was brought were proper. We thus examine the pleadings, affidavits and dispositions currently on file in our review of this summary judgment.

the procedures for termination of a tenured professor[12] but do not address removal of clinical privileges; Daly's tenured employment and salary were not reduced because of the removal of the privileges; Daly was told by Dr. Sprague not to communicate with patients while he had no clinical privileges; and Daly was unable to consult with another physician during the week of July 10-17 because of the removal of his clinical privileges.

The Defendants assert that the facts set forth by Daly fail to establish that he had a property or liberty interest in the clinical privileges. We agree. Notably absent from Daly's pleadings, the depositions filed, briefs and affidavits are any facts from which we can determine that clinical privileges rise to the level of a property or liberty interest.

A property interest has been defined by the Supreme Court:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it.

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[12]The Regulations state in pertinent part:

> 6.3 Termination by an institution of the employment of a faculty member who has been granted tenure and of all other faculty members before the expiration of the stated period of their appiontment, except by resignation or retirement for age in accordance with these rules, will be only for good cause shown. In each case the issue will be determined by an equitable procedure, affording protection to the rights of the individual and to the interests of the System.
>
> 6.31 An institutional head may for grave cause suspend an accused faculty member pending immediate investigation or speedy trial as hereinafter provided.
>
> ...
>
> 6.33 In cases where other offenses are charged, and in all cases where the facts are in dispute, the accused faculty member will be informed in writing of the charges against him, which, on reasonable notice, will be heard by a special hearing tribunal whose membership shall be appointed by the institutional head from members of the faculty whose academic rank is at least equal to that of the accused faculty member.

> He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.
>
> . . . .
>
> Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Board of Regents v. Roth, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1971). *See Moore v. Otero*, 557 F.2d 435, 437 (5th Cir. 1977) (we look to state law for the existence of a property interest).

[8, 9] Employment as a university faculty member when accompanied by regulations prohibiting discharge except for good cause and under certain procedures gives rise to a property interest. *Board of Regents v. Roth*, 408 U.S. at 567, 92 S.Ct. at 2704. Possession of medical staff privileges, under certain circumstances, may also constitute such a property interest. *Northeast Georgia Medical Radiological Assoc. v. Tidwell*, 670 F.2d at 507, 510-511 (5th Cir. 1982); *Klinge v. Lutheran Charities Ass'n of St. Louis*, 523 F.2d 56 (8th Cir. 1975); *Christhlif v. Annapolis Emergency Hospital Ass'n, Inc.*, 496 F.2d 174 (4th Cir. 1974); *Woodbury v. McKennon*, 447 F.2d 839 (5th Cir. 1971); *Meredith v. Allen County War Memorial Hospital*, 397 F.2d 33 (6th Cir. 1968). Daly does not allege facts, however, to show that the removal of his clinical privileges in any way affects his tenure, nor does he allege right to termination of the clinical privileges only for good cause and only after compliance with certain procedures established by the Board of Regents or the Medical School bylaws or any written contract or any state custom or mutual understanding. Ultimately, Daly has alleged no facts to show "the existence of rules or mutually explicit

understandings," *Perry v. Sinderman*, 408 U.S. 593, 601, 92 S.Ct. 2694, 2699, 33 L.Ed.2d 570 (1972), that create a property interest in these privileges.

[10]Where medical staff privileges have been held to constitute an interest protected by the fourteenth amendemnt, it has been because there was an explicit or implicit agreemend providing for no termination of the privileges without cause and a hearing, *Northeast Georgia Radiological Assoc. v. Tidwell*, 670 F.2d at 510-5111, or because denial of staff privileges "might effectively foreclose ... practicing in the area because of harm [a] professional reputation and because of the lack of other [comparable] facilities," *Christhlif v. Annapolis Emergeny Hospital Ass'n, Inc.*, 496 F.2d at 178. Daly provides no facts to show that his clinical privileges would be analogous to medical staff privileges, that there was any explicit or implicit written or oral agreement or understanding which created an entitlement to these privileges, or that the removal of his clinical privileges actually totally foreclosed his ability to practice. We do not intimate that clinical privileges could not rise to the level of a constitutionally protected property interest; we only say that, in this case, Daly did not meet his burden of presenting facts to show that a property interest existed. A doctor has no constitutional right to practice medicine at a public hospital, *Hayman v. Galveston*, 273 U.S. 414, 47 S.Ct. 363, 71 L.Ed. 714 (1927); we hold that, absent any facts to establish the nature of Daly's clinical privileges as they related to his tenure or to a contract with the Medical School or to any written or oral agreement with the Medical School, Daly has shown no property interest in those clinical privileges.

[11] Likewise, Daly did not demonstrate the existence of a liberty interest in his claim that the removal of his clinical privileges damaged his reputation. *Paul v. Davis*, 424 U.S. 693, 711-12, 96 S.Ct. 1155, 1165, 47 L.Ed.2d 405 (1976); *Moore v. Otero*, 557 F.2d at 437. As this court has articulated:

"In *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976), the Supreme Court ruled that defamation by a state official alone did not deprive an individual of a liberty interest protected under the due process clause of the fourteenth amendment so as to give rise to a 42 U.S.C. §1983 action. *To establish a liberty interest sufficient to implicate fourteenth amendment safeguards, the individual must be not only stigmatized but also stigmatized in connection with a denial of a right or status previously recognized under state law. See Paul, supra* at 711-12, 96 S.Ct. 1155 [at 1165]."

Moore v. Otero, 557 F.2d at 437 (emphasis added). Under this "stigma-plus" test, *id.*, assuming that the loss of clinical privileges stigmatized Daly, his retention of his tenured professorship absent any showing that he had an entitlement to the clinical privileges negates his claim that he was denied "liberty." While some actions could be so devastating as to amount to a "loss of employment" and implicate a liberty interest, *id.* at 438, Daly simply did not allege facts to show that such a drastic change in status occurred in his situation. His privileges were removed after he indicated he would be unavailable; he did not, however, suffer loss of employment; he was still a tenured professor; on his return from voluntary leave his privileges were quickly restored. Any alleged damage to reputation because Daly could not see patients or because he would be forced to reveal the temporary loss of privileges does not implicate a liberty interest.[13]

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[13]Daly relies on *Goss v. Lopez*, *supra*, to support his allegation of deprivation of a liberty interest. In *Goss*, students who were required by Ohio state law to attend school were subjected to disciplinary suspensions of ten days without benefit of any due process hearing. Such suspensions were held to be deprivations of the students' liberty interests in reputation and future employment. Daly argues that the removal of his privileges damages his reputation and prospects for future employment and is analogous to the suspensions in *Goss*. We disagree. In *Goss* the students possessed a protected fourteenth amendment entitled to attend school and deprivation of this right could not be affected without due process.

V. FIRST AMENDMENT VIOLATION

Daly has also alleged a deprivation of his first amendment rights of speech and association. He alleged Sprague forbade him to communicate with patients and that he was unable to participate in a consultation with another physician because of the removal of his clinical privileges.

The district court described Daly's assertion that he was forbidden to communicate with patients as an allegation of deprivation of liberty, that is, that his reputation was damaged because he could not practice his profession. As explained in part IV, *supra*, we agree that there was no liberty interest implicated in the removal of the clinical privileges and the resulting inability, if any, to see patients.

Daly's allegations, however, raise first amendment concerns which are not dependent upon the existence of a liberty or property interest. *Perry v. Sinderman*, 408 U.S. at 596, 92 S.Ct. at 2696. Daly alleges that his first amendment rights of speech and association were infringed by the removal of his clinical privileges. This particular claim is not that Daly's clinical privileges were removed *because* of his exercise of a protected first amendment activity,[14] *id.*, but that protected first amendment activities were impermissibly infringed be-

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Here, however, when there is no loss of employment or showing of the possibility of foreclosure from future employment no *Goss* liberty interest is implicated.

This conclusion is quite consistent with our most recent holding in this area, *Goss v. Lopez*, 419 U.S. 565 [95 S.Ct. 729, 42 L.Ed.2d 725] (1975), that suspension from school based upon charges of misconduct could trigger the procedural guarantees of the Fourteenth Amendment. While the Court noted that charges of misconduct could seriously damage the student's reputation, *id.* at 574-575 [95 S.Ct. at 736], it also took care to point out that Ohio law conferred a right upon all children to attend school, and that the act of the school officials suspending the student there involved resulted in a denial or deprivation of that right.

Paul v. Davis, 424 U.S. at 710, 96 S.Ct. at 1164.

[14]This claim differs from Daly's claim that his privileges were removed because he challenged the MSRDP accounting practices. See part II, *supra*.

cause of Sprague's prohibition of any communication with his patients. *See Broadrick v. Oklahoma*, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973) (state could restrict employee participation in political activity).

This first amendment question is not whether Daly may be disciplined because of his speech, but whether, in the course of the removal of his clinical privileges, his rights to communicate and associate with patients could be limited. Daly alleges that they could not be so limited. He also alleges facts to support the existence of this legal question. He alleges in his pleadings, affidavits and briefs that he was told by Dr. Sprague that he could not communicate with patients and that, as a result, he was unable to participate in a consultation with another physician relating to a seriously ill patient. For example, in his Answer to Motion for Summary Judgment he states:

> Once Plaintiff returned from being in attendance during the illness of his wife, he should have been permitted to see his patients, and Defendants' failure to allow him to do so most certainly compounded whatever needs were then being experienced by Plaintiff's patients. This was a denial of Plaintiff's rights of free speech and a deprivation of a liberty interest as protected by the U.S. Constitution.

[12] The Defendants did not negate, in their pleadings, affidavits or briefs, the factual and legal issues raised by these first amendment claims; they did not even address them in the Motion for Summary Judgment.[15] Our review of the

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[15]The only rebuttal stated by Defendants in relation to Daly's allegations of the violation of his first amendment rights was a footnote in their brief on appeal:

> In his Brief, Appellant has also alleged a claim (not previously examined in detail in Appellant's Original Complaint) that his right of free speech under the First Amendment was violated because (1) he was told by Appellee Sprague that he could not communicate with patients, . . . [This contention] must fall before Appellant's utter failure to point to any specific facts which support[s] this allegation.

district court's Order granting summary judgment indicates that it failed to analyze Daly's factual allegations of this infringement of his first amendment rights of speech and association or to determine if summary judgment was proper as a matter of law. *See Impossible Electronic Techniques*, 669 F.2d 1026 at 1030. Thus, because the Defendants wholly failed to address the legal or factual questions, they failed to carry their dual burden of demonstrating that there was no genuine issue as to any material fact and that they were entitled to summary judgment as a matter of law, *id.*, the granting of the motion for summary judgment was inappropriate. We decline, from this record, to address these issues prior to consideration by the district court. We decline, from this record, to address these issues prior to consideration by the district court. We remand the case for appropriate supplemental briefing and discovery, if necessary, and consideration of Daly's first amendment claim. We intimate no view as to the merits of Daly's claim.

VI. OTHER CLAIMS

Daly alleges error in the district court's noting in a footnote but not deciding that his damage claim was barred by the Eleventh Amendment.[10] The court based its opinion on the rationale that the individual defendants were sued only in their official capacities. We decline to address Daly's allegation of error at this time. Should, on remand, there be a subsequent finding that Daly's action survives the Motion for Summary Judgment, the district court should decide the issue in the first instance. In that event, our decision in *United Carolina Bank v. Stephen F. Austin State University*, 665 F.2d 553 (5th Cir. 1982) (discussing the applicability of

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[10]The court stated:

> In addition, the Court notes without deciding that plaintiff's claim against defendants appears to be against them only in their official capacity, and would, therefore, be barred under the Eleventh Amendment at least as to the damage portion of this claim. *See Edelman v. Jordan*, 415 U.S. 651 [94 S.Ct. 1347, 39 L.Ed.2d 622] (1974).

the Eleventh Amendment to individual university officials in Texas), may be useful in the court's analysis of the liability of Defendants Rosenberg, Sprague and Bonte.

[13] Additionally, Daly claims the district court erred in its determination that the members of the Board of Regents could not be subjected to liability in this §1983 action. The court held there was no showing that "these defendants either took part in the decisions which are alleged to have violated plaintiff's rights, or that they in any way knew of the decisions." We agree. This statement correctly applies the applicable law. Daly stated only that the Regents failed to develop a policy relating to removal of clinical privileges and that his clinical privileges were subsequently removed. He wholly omitted any allegation or facts from which even an inference could be drawn that the absence of a policy in any way caused the allegedly impermissible removal of his clinical privileges.

> It is axiomatic that a plaintiff cannot succeed in a §1983 action if he fails to demonstrate a causal connection between the state official's alleged wrongful action and his deprivation of life, liberty, or property. *See Parratt v. Taylor*, 451 U.S. 527, 537, n.3, 101 S.Ct. 1908, 1913 n.3, 68 L.Ed.2d 420 (981) (Supreme Court would assume necessary finding of causal connection between alleged negligence and deprivation of property); *Douthit v Jones*, 641 F.2d 345 5th Cir. 1981); *Henzel v. Gerstein*, 608 F.2d 654 (5th Cir. 1979) (in §1983 action, causal connection must be shown between act of supervisory official and deprivation, either by evidence of direct participation or otherwise); *cf. Martinez v. California*, 444 U.S. 277, 285, 100 S.Ct. 553, 559, 62 L.Ed.2d 481 1980) (connection was too tenuous between act of parole board and actions by released convict to constitute unconstitutional deprivation of life).

Reimer v. Smith, 663 F.2d 1316, 1322 n.4 (5th Cir. 1981). The judgment of the district court as to the Board of Regents and individual Regents is affirmed.

[14] Finally, Daly complains that the district court heard the Defendants' Motion for Summary Judgment less than ten days after the filing of the Amended Motion. The Motion for Summary Judgment was originally filed on August 29, 1980, and included several exhibits and affidavits. Daly answered the Motion on September 22, 1980, filing a brief, his own affidavit and several exhibits, including pertinent letters exchanged with Rosenberg. On September 29, 1980, the district court extended time for discovery and reserved its ruling on the Motion for Summary Judgment. An Amended Motion for Summary Judgment was filed on February 3, 1981. An oral hearing was held on February 9, 1981. Daly was given extra time to file a supplemental answer and did so on February 11, 1981. On February 7, 1981, Defendants filed a Response to Plaintiff's Supplemental Answer to the Amended Motion for Summary Judgment. On March 2, 1981, Daly filed a Second Supplemental Answer to the Motion for Summary Judgment. The court granted the Motion for Summary Judgment on April 30, 1981.

Daly, within the meaning of *Kibort v. Hampton*, 538 F.2d 90 (5th Cir. 1976), had more than ten days' advance notice of the court's ruling on the motion and more than ten days in which to be heard, that is, to file appropriate pleadings and affidavits.

> What the rule contemplates is 10 day[s] advance notice to the adverse party that the matter will be heard and taken under advisement as of a certain date. This provides the adverse party with an opportunity to prepare and submit affidavits, memoranda and other materials for the court to consider when ruling on the motion. If the adverse party is given this opportunity, then he has been heard within the meaning of Rule 56:

Id. at 91 (emphasis added). See *Village Harbor, Inc. v. United States*, 559 F.2d 247 (5th Cir. 1977) ("Plaintiffs had over two months to respond to the summary judgment motion;" there was no violation of Fed.R.Civ.P 56c).).

Daly had more than ten days to submit pleadings and affidavits before the district court, on September 29, 1980, extended discovery and reserved judgment on the Motion for Summary Judgment. Additionally, after the Motion was reurged, Daly was heard at an oral hearing and filed two more pleadings citing additional legal authority and pertinent deposition excerpts prior to the court's ruling, three and one-half months later, on April 30, 1981.

The judgment of the district court is reversed insofar as summary judgment was granted without consideration of Daly's allegations of violation of his first amendment rights. The case is remanded for any necessary supplemental briefing as to the legal issues and discovery as to the factual issues relating to this first amendment claim.

Defendants shall bear the cost of this appeal.

AFFIRMED IN PART, REVERSED IN PART and REMANDED WITH INSTRUCTIONS.

Appendix C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 81-1237

DAVID D. DALY, M.D., Ph.D,
Plaintiff-Appellant,

v.

CHARLES C. SPRAGUE, M.D., ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas

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ON PETITION FOR REHEARING
(August 25, 1982)

Before THORNBERRY, REAVLEY and RANDALL, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

United States Circuit Judge

Appendix D — Constitutional Provisions, and Statutes

1. UNITED STATES CONSTITUTION, AMENDMENT I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. UNITED STATES CONSTITUTION, AMENDMENT XI

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

3. UNITED STATES CONSTITUTION, AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citi-

zens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officers of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties or services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

4. 42 U.S.C. §1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity,

or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

5. 42 U.S.C. §1985

(1) If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

Obstructing justice; intimidating party, witness, or juror

(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

Depriving persons of rights or privileges

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

6. 42 U.S.C. §1986

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrong-

ful act and neglect, the legal representatives of the decreased shall have such action therefor, and may recover not exceeding $5,000 damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.

7. TEXAS EDUCATION CODE §65.02

§65.02. Organization

(a) The University of Texas System is composed of the following institutions and entities:

• • •

(7) The University of Texas Health Science Center at Dallas, including

(A) The University of Texas Southwestern Medical School at Dallas;

• • •

8. TEXAS EDUCATION CODE §65.31:

§65.31. General Powers and Duties

(a) The board is authorized and directed to govern, operate, support, and maintain each of the component institutions that are now or may hereafter be included in a part of The University of Texas System.

(b) The board is authorized to prescribe for each of the component institutions courses and programs leading to such degrees as are customarily offered in outstanding American universities, and to award all such degrees. It is the intent of the legislature that such degrees shall include baccalaureate, master's, and doctoral degrees, and their equivalents, but no new department, school, or degree-program shall be instituted without the prior approval of the Coordinating Board, Texas College and University System.

(c) The board has authority to promulgate and enforce such other rules and regulations for the operation, control, and management of the university system and the component institutions thereof as the board may deem either necessary or desirable. The board is specifically authorized and empowered to determine and prescribe the number of students that shall be admitted to any course, department, school, college, degree-program, or institution under its governance.

(d) The board is specifically authorized to make appointments in the component institutions under its governance. The salary of any person who receives such joint appointment shall be apportioned to the appointing institutions on the basis of services rendered.

(e) The board is specifically authorized, upon terms and conditions acceptable to it, to accept and administer gifts, grants, or donations of any kind, from any source, for use by the system or any of the component institutions of the system.

((f) No component institution which is not authorized to offer a four-year undergraduate program shall offer a four-year undergraduate program without the specific authorization of the legislature.

Amended by Acts 1971, 62nd Leg., p. 3360, ch. art. 2, §37, eff. Sept. 1, 1971.

Appendix E — Memorandum by Defendant Bonte Showing Concerted Effort to Bring About Daly's Dismissal About Two Months After Suit Was Filed.

CONVERSATIONS REGARDING DR. DALY, DEPARTMENT OF NEUROLOGY, September 26, 1979

Dr. Rosenberg stated that Dr. Daly had missed a recent lecture assignment, and as instructed by Mr. Taylor, Dr. Rosenberg had documented this episode with a letter. In the same letter, Dr. Rosenberg states that Dr. Daly has been assigned another lecture on October 17, but has asked for a vacation which will include that date. In the same letter, Dr. Rosenberg has instructed Dr. Daly that although he may have a vacation prior to that date, he is to be in the department, and he is to deliver the stipulated lecture on that date.

Dr. Rosenberg and I called Mr. Lynn Taylor and explained the recent happenings to him. He advised no additional correspondence pertaining to the recent missed lecture, and he advises documenting whatever occurrence there may be in connection with the lecture of October 17. On questioning, Mr. Taylor declared that should Dr. Daly miss the lecture of October 17, and this fact is properly documented, it might be unnecessary to document any additional episodes, and we might proceed with dismissal hearings at that time.

FJB

ATTACHMENT TO PLAINTIFF's AFFIDAVIT IN SUPPORT OF ANSWER TO DEFENDANTS' MOTION TO DISMISS OR MOTION FOR SUMMARY JUDGMENT

Appendix F — Letter from Daly to Defendant Rosenberg, questioning accounting of MSRDP Fund.

June 1^ 1979

Roger N. Rosenberg, MD
Professor and Chairman
Department of Neurology
University of Texas Health Science Center
Dallas, Tx. 75235

Dear Roger:

Enclosed find two checks, one for $17.33 and the other for $67.84.

1. The check for $17.33 covers three calls to Mexico:

   a. $8.38 to return a call from the Ministry of Education and Technology. The Government of Mexico organized a Symposium concerning a new anti-epileptic drug, the first AED developed in the Third World. They invited me as the only participant from this country because of my work in the pharmacology of AED.

   b. $8.95 for two calls to Monterrey, N.L. While in Monterrey earlier this year as an invited faculty member in a post-graduate course on epilepsy at the Medical School, I was asked to see in consultation a principal industrialist there. These calls involve complex problems in his continuing care.

2. At and since the time of the Presidential Commission, it was formally agreed that the Department would pay and be reimbursed subsequently for calls involving the Commission as well as calls related to international societies (e.g., ILAE). The check for $67.94 covers two calls to Vancouver, BC; These concern the Organizing Committee of the World Congress of Epilepsy to be held in Kyoto, Japan in 1981, in

conjunction with the World Congress of Neurology of WFN and the World Congress of the International Federation of EEG and clinical Neurophysiology. I am a member of the Organizing Committee.

By the University's accounting of the MSRDP Trust, dated February 19, 1979, the School had received $5061.28 for professional services I rendered in 1978. Clearly there are sufficient funds to pay for calls related in Item 1. Two issues emerge in this accounting:

1. Of the $5061.28, $292.00 derived from Medicare, and nothing from Medicaid. In 1978 in addition to my other responsibilities, I attended for two months on the Consultation Service of PMH, and I interpreted EEGs for four months at PMH and CMC (c. 400). It is astonishing that the School has received only $292.00 from these services.

2. In your letter of October 5, 1978, you state that last year my services generated MSRDP income of $1413.00. Your accounting is in conflict with that of the School; this disparity must be resolved. You closed your letter by asking me for ideas which could generate more income. I renewed the suggestion that the Department establish a laboratory which could do AED levels for patients we see in the Department.

The monies from private patients are considerable and reflect my reputation for care provided epileptic patients with difficult to control or intractable seizures; they include referrals from physicians in the community, from physicians outside the community whose patients move to the Metroplex, and requests from the UT System to see VIP patients. Successful management of patients ith these complex problems often requires multiple and frequent determinations of AED levels, as well as behavioral monitoring. For effective treatment AED levels must be accurate and immediately available. These and other reasons have led to requests, which were denied, for a Department Laboratory for AED

level services. Proposals for sharing agreements with the VA and other hospitals remain unconsummated. Because of our collaborative studies the AED Laboratory at the VA performs AED levels on my patients on a research basis. Other Department members send specimens to outside private laboratories. By rendering these services a Department Laboratory could provide a stable source of income, which the Department could use apparently.

Trusting the accounting will be made promptly, and that the matters of service will be resolved so that I can provide care of the caliber for which these patients have been referred to me, I remain

Sincerely,

David D. Daly, MD, PhD
Professor of Neurology

Appendix G — Letter from Defendant Rosenberg to Daly, removing Daly's clinical privileges.

June 26, 1979

David D. Daly, M.D., Ph.D
Professor of Neurology
Department of Neurology
University of Texas Health Science Center
Southwestern Medical School
Dallas, Texas 75235

Dear Dave:

After discussing in some detail with Dr. Bonte and Dr. Sprague, the matter of the quality of your professional activities and personal conduct in the recent past, and in view of your recent phone call to Dr. Sprague indicating the uncertainty of your continued full-time presence, it is my responsibility to inform you that as of today your clinical privileges as a faculty member in this department have been removed. Dr. Bonte and I have discussed the numerous areas of concern that I have had about your overall performance here and he has attempted on several occasions to meet with you to discuss these issues. You have not kept any of these appointments with Dr. Bonte and thus you leave us no course but to take this action.

Additional steps may have to be taken by us to correct the situation. Your contacting Dr. Bonte at 688-2022 to make another appointment is recommended.

Sincerely yours,

Roger N. Rosenberg, M.D.
Professor of Neurology and Physiology
Chairman, Department of Neurology

RNR: j

Appendix H — United States District Court, for the Northern District of Texas, Dallas Division, Order

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

DAVID D. DALY, M.D., ET AL, *Plaintiffs,*	)	
vs.	)	CIVIL ACTION
CHARLES C. SPRAGUE, M.D., ET AL, *Defendants.*	)	NO. CA-3-79-1108-D

ORDER

The Court has been instructed by the Fifth Circuit to reconsider its grant of summary judgment for Defendants Charles Sprague, M.D. *et al.* on the issue of the infringement of Plaintiff David D. Daly's (Daly) first amendment rights following the removal of his clinical privileges. Accordingly, the Court directs the defendants to file a new Motion for Summary Judgment and Brief in Support thereof limited to the following issues: (1) the existence or nonexistence of a genuine issue of fact surrounding any curtailment of communication between Daly and his patients, and (2) entitlement to judgment as a matter of law based on the constitutional implications of any such interference. Unless informed otherwise, the Court will assume that consideration of these issues will be possible without the necessity of further discovery. It is further noted that any consideration of the potential eleventh amendment issue in this case shall be postponed.

The Court hereby directs the defendants to file their motion and supporting brief within 20 days of the date of this order. Daly shall then have 20 days from his receipt of the motion and brief to offer his response.

It is so ORDERED.

Dated this 18 day of October, 1982.

R. Hill

United States District Judge